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subject as the present state of the authorities will warrant, the rule being as yet not entirely settled.

Courts of equity however, as stated in the principal case, will be vigilant to lay hold of any extraneous circumstances which will justify their interposition to prevent marked injustice being done: 1 Story's Eq. Jur. (Redfield's ed.) § 138 c, note; Bisp. Eq. (2d ed.) § 188. They will relieve against a mistake of law even when brought about by innocent misrepresentation. (See the cases cited at the end of this note.) And where a mistake is manifest, and it is doubtful whether it is a mistake of law or of fact, they will presume it to be a mistake of fact, until it is shown that all the facts were known: *Hurd v. Hall*, 12 Wis. 112, 131.

Returning to the principal case, it seems to be very clearly correct; for, as stated by the court, "The written agreement did not effect that which the parties intended," and had previously agreed upon; which would bring the case within the second class of cases above referred to. Moreover, the mistake was induced by the representation of the insurance agent that the policy as written would fully protect the interest of the firm; and, as we have seen, a mistake of law, caused by misrepresentation, though innocent, is a ground of equitable relief: see *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Longhurst v. Star Ins. Co.*, 19 Iowa 364; *Jordan v. Stevens*, 51 Me. 78; *Freeman v. Curtis*, Id. 140; *Green v. Morris, &c. R. R.*, 12 N. J. Eq. 165.

MARSHALL D. EWELL.

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### *Supreme Court of Michigan.*

#### JOHN McEWEN v. CHARLES ZIMMER.

By a statute of the dominion of Canada, a judgment is permitted to be rendered against a person resident abroad, on a service made upon him out of the dominion. A citizen of Michigan was sued in Canada and service of process made in Michigan. He did not appear in the suit, and judgment was taken by default. Suit being brought on the judgment in Michigan, *Held*, that it was a nullity.

No sovereignty can subject persons not within its limits to the jurisdiction of its courts by constructive service, or by service made within the limits of another sovereignty.

THIS was an action upon a judgment purporting to have been rendered by the county court of county Essex, in the Province of Ontario, Dominion of Canada, in favor of McEwen against Zimmer. The only question which the record presented was one of jurisdiction in the county court of Essex to render the judgment, and this arose upon the service which was made upon the defendant. Zimmer was proceeded against as a non-resident under certain provisions of the statutes, known as the Consolidated Statutes of Upper Canada, by which upon a cause of action arising in Upper Canada a writ is allowed to be issued and served upon the defendant outside the jurisdiction of Canada, and upon such service the action may proceed to judgment.

Zimmer, it was conceded, was not a British subject, and the record of the judgment in the county court showed that the only service made upon him was made at the city of Detroit, in this state. It also showed that he did not, in any manner, respond to the service, and that judgment was taken against him by default. No property appeared to have been attached in the province, and no jurisdiction to render the judgment was claimed, unless the service in Detroit conferred it. The court below held that the judgment was a nullity.

The opinion of the court was delivered by

COOLEY, J.—The only question the record presents may be stated as follows: Whether it is competent for a foreign court to make service of its process in this state, and on the authority of such service to proceed to judgment against a party who refuses to recognise the jurisdiction.

We had not supposed, until this suit was brought to our attention, that such a jurisdiction could seriously be contended for. The rule laid down by Judge STORY in his *Conflict of Laws* has been supposed to be of universal acceptance, that “no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals.” *Conf. of Laws*, § 539. Mr. Wharton repeats this rule, as one not questioned: *Conf. of Laws*, § 712; and it is believed to have been recognised in every case arising in the courts of this country in which the exact point has been presented. If any case is an exception, it has escaped our attention.

It is urged, however, that the rule in Great Britain and the British provinces is otherwise, and that comity requires that we recognise and accept the rule of jurisdiction that prevails where the judgment was rendered. The obligations of international comity, we trust, will never be questioned in this state, especially when they are invoked in behalf of our neighbors of the Dominion, with whom our relations are so intimate, and it may be added, so friendly and cordial. We should certainly never have the assurance to demand from them more than we would freely and voluntarily concede to them. True comity is equality, we should demand nothing more and concede nothing less.

The English decisions having direct bearing on the question are not very numerous: *Douglas v. Forrest*, 4 Bing. 686, was an action in England upon a Scotch judgment, obtained without personal service, and after notice to the defendant by the process called "horning," which may or may not have ever come to his knowledge. The validity of the judgment was recognised, and the action sustained. But an inspection of the case and a reading of the opinion of Chief Justice BEST will disclose the fact that the rule, as laid down by Mr. Justice STORY, in his treatise on the Conflict of Laws, is in no manner assailed or questioned. The defendant was executor of a Scotch estate, and it was in that capacity that he was sued; and the jurisdiction was supported on the express ground that the estate was within the jurisdiction of the Scotch court, and that the defendant himself owed allegiance to that country. "To be sure," says the chief justice, "if attachments issued against persons who were never within the jurisdiction of the court issuing them could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts or obey its laws. We confine our judgment to a case where a party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given whilst the debtor resided in it."

In *Bequet v. McCarthy*, 2 B. & Ad. 951, the judgment in question was rendered in one of the British colonies, and by the law of the colony, if the defendant was absent and could not be personally served; the service was permitted to be made on the king's attorney-general for the colony. It was so made in that case; the defendant, who was an official lately domiciled in the colony, being then absent. The substituted service was sustained as sufficient. It was made within the jurisdiction of the court, and the case is therefore not analogous to the present, and we have no occasion either to approve or question it. Our laws provide in some cases for a substitute for personal service where the party is within the jurisdiction or only temporarily absent, and where the substitute is such as with reasonable certainty will bring the proceeding to the

knowledge of the respondent, it is perhaps competent to give to such service the full effect of that made upon a person, but no such question is now before us.

In *Bank of Australasia v. Nias*, 16 Q. B. 717, the defendant, who was a stockholder in a joint stock company in New South Wales, was sued in England on a liability as such stockholder, which it was claimed was established by a judgment against the chairman of the company in New South Wales, under a statute which permitted the chairman to be sued as representative of the company. The statute was sustained, and the action was supported. Lord CAMPBELL, in his opinion, declares that the statute was passed for the benefit of the company, and that there was nothing at all repugnant to the law of England, or to the principles of natural justice, in enacting that actions upon contracts made by the company, instead of being brought individually against all the stockholders, should be brought against the chairman whom they had appointed to represent them. The case is treated as one in which the parties, by accepting the benefits of a statute, had consented to certain forms of procedure for which it provided.

A case more important to the present discussion is that of *Schibsby v. Westenholz*, Law Rep. 6 Q. B. 155. The action in that case was upon a French judgment, obtained without personal service of process, under a statute not differing essentially from the statute of Upper Canada, which is supposed to sustain the judgment now in question. The only difference of moment between that case and the present is that there the contract on which the French court gave judgment was an English contract, while in this case the judgment was given for services performed by the plaintiff in Canada, and possibly it may be claimed that the implied contract to pay for these services was a Canada contract, though the defendant was not in Canada at the time. Whether this difference has any legal significance will be considered further on. Putting this circumstance aside, the two cases are strictly analogous, and it is fortunate that, in passing upon the force that should be given to a Canadian judgment under the circumstances, we are afforded the light of a decision by one of the courts at Westminster on the very point in dispute.

It should be stated here that the statute of Upper Canada was a substantial reproduction in that province of the provisions of the

English Common Law Procedure Act (1852), which in terms permit judgment to be taken against persons out of the realm on a service of process made abroad. The case was therefore one in which it might be urged with great force that comity required that the courts in England should recognise the validity of judgments obtained in France upon a service precisely analogous to that which the English statute made sufficient to support a judgment in that country. BLACKBURN, J., in delivering the opinion of the court, proceeded to declare as the true principle on which the judgments of foreign tribunals are enforced in England, that stated by PARKE, B., in *Russell v. Smyth*, 9 M. & W. 819, and repeated in *Williams v. Jones*, 13 M. & W. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of England are bound to enforce, and that consequently anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action, proceeds to say: "We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act (1852), conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed; and we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident of Great Britain, under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down. Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if judgment being given against him in our courts, an action were brought upon it in the courts of the United States—where the law as to the enforcing foreign judgments is the same as our own—a further question would be opened, viz., not only whether the British legislature had given

the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognise, to submit to the jurisdiction thus created." And further on he says that the real question which the court of the United States must pass upon in the supposed case would be this: Can the island of Great Britain pass a law to bind the whole world? A question which he ventures to answer without hesitation in the negative.

But for a single remark in this opinion by Mr. Justice BLACKBURN, it should, as it seems to us, be accepted on all sides as covering completely the present case. The remark referred to is in the nature of a suggestion, that if at the time when the obligation was contracted the defendants were in a foreign country, but left it before the suit was instituted, perhaps the laws of the foreign country ought to bind them. The remark was not relevant to any facts then before the court, nor, in our opinion, does the present case require us to consider how far the suggestion has force. This defendant was not in Canada when the demand accrued, and in no manner has he submitted himself to its laws, unless he can be said to have done so in employing the services of the plaintiff in that country. If we might assume, which we cannot under the circumstances, that the supposed contract was a Canada contract, it is not by any means clear to our minds that the fact should affect the decision. If the obligation on the courts of one country to enforce the judgments of another be grounded in comity, it ought to appear that under corresponding circumstances it would be expected in this state that the courts of Canada would enforce a judgment given in Michigan on a Michigan contract against a resident of Canada, who was never served with process, except in the Dominion. So far is it from being the fact that such an expectation would exist, that the courts of this state are not permitted, by virtue of any statute or of any principles supposed to be derived from the common law, to render any such judgment; and should it by inadvertence, or by mistake of law, be entered up by any court of this state, any other court, and indeed the party defendant, might treat it, so far as it assumes to establish a personal demand against him, as an absolute nullity. No better illustration of the views held by our own courts upon this subject can be instanced than the case of foreclosure suits in equity against non-resident mortgagors where, although the case may proceed to decree on notice given by publication, or personally served in a foreign jurisdiction, yet the notice

is never accepted as the full substitute for service of process within the state, and though the case goes to a decree for the sale of the land, a personal decree against the party liable for the mortgage debt is never permitted to be taken upon such notice: *Lawrence v. Fellows*, Walk. Ch. 468; *Outwhite v. Porter*, 13 Mich. 533; *Tyler v. Peatt*, 30 Mich. 63. We may then dismiss comity from consideration as constituting any basis for the enforcement of the judgment now before us. We should certainly, *mutatis mutandis*, not expect it to be enforced. And we may add that in the still more pointed case of the attachment of lands of a non-resident as the commencement of a suit to collect a debt, though the statute provides for the case proceeding to judgment against the defendant on proof of the statutory notice by publication, yet the judgment is not regarded as establishing a personal demand against the defendant, and we should neither expect it to be enforced as such abroad, nor enforce it ourselves. This is so well understood in this state that the point is never mooted.

On the other hand, if the obligation to enforce a foreign judgment is to be rested on the duty or obligation of the defendant to pay the sum for which the judgment was given, as Mr. Baron PARKE and Mr. Justice BLACKBURN suppose, then it is important to know from what such duty or obligation springs. It is certain that it cannot spring from the mere fact that some court has assumed to render a judgment, but the proceedings anterior to the judgment must have been such as fairly imposed upon the party sued the obligation to appear and make his defence to the demands set up, if any he have; and if, under the circumstances, he was fairly entitled to treat any notice of the suit which may have been given him as unwarranted, and to disregard it, then it seems plain that no obligation to recognise the conclusions of the court could possibly arise. The question, then, seems to be narrowed to this: whether the service of process beyond the jurisdiction of the court issuing it, can impose upon the party served the obligation to appear in the suit and make there his defence, if he has any? If this question must be answered in the affirmative as regards a judgment rendered in Canada, it must receive a like answer when it contemplates a judgment rendered on a like service in New Zealand, or in one of the colonial courts of the Dutch East Indies. The question, therefore, is not one to be disposed of on a consideration of merely how this defendant might be affected; but it sug-

gests the possible cases of citizens of this country proceeded against in the remotest borders of civilization, on claims which may or may not have a foundation in justice, but which become established claims by default in making answer to a suit upon them.

Now the service of process is for the purpose of notifying the defendant, and giving him a fair opportunity to defend. But the service of process in Michigan, which requires one to appear and answer to a demand in a foreign country would in general be of no value whatever, because a defence abroad would either be practically impossible, or would be so expensive as to exceed in cost the importance of the demand. It may therefore justly and emphatically be declared that such service would give no fair opportunity to defend, and consequently could not accomplish the purpose of process. Were the doctrine accepted which would permit it, it might reasonably be anticipated that fictitious claims would be asserted abroad against Americans, who, for business or pleasure, had visited foreign countries, and would become established claims by default in a defence which a party wrongfully charged could not afford to make. We think the doctrine has no foundation in reason, or in the principles of international law or international comity.

We refer, as supporting these general views, to *Bischoff v. Wetherall*, 9 Wall. 812, and *Wood v. Parsons*, 27 Mich. 159. Also to *People v. Dawell*, 25 Mich. 247, where the general subject received some attention.

We find no error in the judgment, and it must be affirmed with costs.

The same conclusion has been reached by the courts of many of the states, in the following cases, amongst others: *McVicker v. Budy*, 31 Me. 314; *Wood v. Watkinson*, 17 Conn. 500; *Woodward v. Tremure*, 6 Pick. (Mass.) 354; *Kane v. Cook*, 8 Cal. 449; *Rangley v. Webster*, 11 N. H. 299; *Winston v. Taylor*, 28 Mo. 82; *Jones v. Spencer*, 15 Wis. 583; *Price v. Hickock*, 39 Vt. 292; *Williams v. Preston*, 3 J. J. Marsh. 600; *Davidson v. Sharpe*, 6 Ired. L. 14; *Arndt v. Arndt*, 15 Ohio 83; *Whittier v. Wendell*, 7 N. H. 257; *Miller v. Miller*, 1 Bailey (S. C.) 242; *Zepp v. Hagar*, 70 Ill. 223; *Frothingham v. Barnes*, 9 R. I. 474.

The question of the validity and effect of foreign judgments, or those of a sister state, and the reason urged in their favor, was quite carefully and elaborately considered by Mr. Justice FIELD in the recent case of *Pennoyer v. Neff*, 95 U. S. (5 Otto) 714, his conclusions being perhaps fairly stated in a quotation taken by him from the opinion of Mr. Justice MILLER, in *Cooper v. Reynolds*, 10 Wall. 308, where, speaking of the effect of a judgment rendered in an action commenced by attachment against a non-resident, he says, "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains

liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant and no service of process on him the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of the proceeding, in this latter class of cases, is clearly evinced by two well established propositions: 1st, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit, No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained upon such a judgment in the same court or any other, nor can it be used as evidence in any other proceeding, not affecting the attached property; nor could the costs of that proceeding be collected out of any other property than that attached in the suit. 2d. The court, in such a suit, cannot proceed, unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.”

In that case, *Penneyer v. Neff*, the action was to recover possession of lands held by defendant, under title acquired at a sale, on execution issued on a personal judgment rendered without personal service or appearance, but after service by publication in the manner prescribed by the laws of the state of Oregon. The defendant was not a resident of that state, but had property in the state subject to attachment or execution, the land in question. The law of Oregon permitted service by publication,

“where the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action.” The suit was not commenced by attachment, but the first step taken to subject the land to the payment or securing of the claim was the execution levy. It was claimed on the part of the execution purchaser that, under the clause of the statute above quoted, no proceeding in the nature of an attachment was necessary, but that the fact of defendants owning property in the state was sufficient to give the court jurisdiction, by substituted service, to render a personal judgment which could be enforced, at least, against such property. But the court held not: that the jurisdiction to inquire into the obligations of a non-resident at all is only incidental to the jurisdiction over the property; and until the court has obtained such jurisdiction over the property by some proceeding in the nature of an attachment, it could obtain none over the defendant.

The questions, which have most frequently been considered by the courts, arising upon foreign judgments, are those relating to the extent to which evidence may be received, explaining or contradicting the recitals of the judgment showing jurisdiction.

In *People v. Dawell*, 25 Mich. 247, cited by Judge COOLEY in his opinion, the record of a divorce granted by an Indiana court was under consideration, and it was proposed to show that the petition, which was recited to have been filed by the wife, was so filed by an attorney who had no authority from the wife to do so. The opinion of the court was upon the ground that the record of the judgment might be impeached by a showing that the wife had never been a resident of Indiana, and that the court could not, therefore, have had jurisdiction of the subject-matter of the action; but Judge CAMPBELL, in his dissenting opinion, discusses the question, more es-

pecially, of the right of a party to an action based upon a judgment rendered in another state, to show *dehors* the record that he was not a resident of that state, or within the jurisdiction of the court, and that an attorney who appeared for him was unauthorized. The following cases hold that he may do so: *Harrod v. Barretto*, 2 Hall (N. Y.) 302; *Aldrich v. Kinney*, 4 Conn. 380; *Shumway v. Stillman*, 6 Wend. 447; *Hall v. Williams*, 6 Pick. 232; *Shelton v. Tiffin*, 6

How. 163; *Pennywit v. Foote*, 27 Ohio St. 600; *Sherrard v. Nevins*, 2 Ind. 241; *Pollard v. Baldwin*, 22 Iowa 328; *Norwood v. Cobb*, 15 Tex. 500; *Watson v. New England Bank*, 4 Metc. (Mass.) 343; *Houston v. Dunn*, 13 Tex. 476. For an expression of the opposite view, see *Wilcox v. Kassick*, 2 Mich. 165, and *Baker v. Struebraker*, 34 Mo. 172, following *Warren v. Turk*, 16 Id. 102.  
E. A. C.

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*United States Circuit Court, Western District of Missouri.*

BAKER v. THE KANSAS CITY TIMES CO.

In an action for libel, where defendant justifies a charge of crime, the defence must be established to the entire satisfaction of the jury, by which is meant that the evidence must produce an abiding conviction upon the minds of the jury of the truth of the charge; but the defence need not be established beyond a reasonable doubt, or with the certainty required to sustain an indictment.

In such a case the party charged with a crime is presumed to be innocent, and the burden of proof is on the plaintiff to establish the guilt of defendant, and where there are acts or statements of the defendant fairly admitting of two meanings, the jury should apply the meaning leading to innocence rather than guilt.

The truth of an alleged libel is, when established, a complete justification of the publication, and bar to the action.

But a party failing to establish his plea of justification, may show, in mitigation of damages, anything tending to establish that he acted without malice or bad intent, but from proper motives.

Absence of actual malice is no bar to an action of libel where the publication is not privileged. The malice implied by law is sufficient upon which to maintain the action, and this cannot be rebutted so as to defeat the action.

Where a plea of justification is not sustained, it is the duty of the jury to award damages to the plaintiff, but the amount thereof should be left to their discretion.

*Seemle*, a party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as a principal, but by advising or commanding another to commit the crime.

THIS was an action for libel; plea justification. The facts sufficiently appear in the charge.

*M. J. Leaming, A. B. Jetmore and H. B. Johnson*, for plaintiff.